

Civil Division – Kent County (739-7641)

February 1, 2007

The Honorable Karen E. Peterson  
Legislative Hall  
P.O. Box 1401  
Dover, DE 19903

**RE:   Application Of The Freedom Of Information Act  
      To The Courts**

Dear Senator Peterson:

You have asked for the opinion of our Office whether the public record requirements of the Delaware Freedom of Information Act, 29 *Del. C.* Chapter 100 ("FOIA"), apply to the courts of the State of Delaware.

FOIA only applies to a "public body." The courts are not a "public body" as defined by FOIA because they do not perform an executive or legislative function of the State or a political subdivision. The statutory language and legislative history of FOIA evidence the General Assembly's intent to respect the inherent independent authority of the judiciary – as a co-equal branch of government – to control access to court records and proceedings.



### **LEGAL AUTHORITY**

FOIA defines a "public body" as:

any regulatory, administrative, advisory, executive, appointive or legislative body of the State, or of any political subdivision of the State, including, but not limited to, any board, bureau, commission, department, agency, committee, ad hoc committee, special committee, temporary committee, advisory board and committee, subcommittee, legislative committee, association, group, panel, council or any other entity or body. . .

established by an act of the General Assembly of the State, or appointed by any body or public official of the State or otherwise empowered by any state governmental entity, . . .

which (1) Is supported in whole or in part by any public funds; or (2) expends or disburses any public funds, . . . or (3) is impliedly or specifically charged by any other public official, body, or agency to advise or to make reports, investigations or recommendations.

29 *Del. C.* §10002c).

"Turning to the keystone, definitional provision of [FOIA], section 10002, a 'public body' consists of two principal elements. First, the organization must fall into one or both of the broad categories of executive or legislative entities of the State or a political subdivision thereof." *Delaware Solid Waste Authority v. The News-Journal Co.*, 480 A.2d 628, 632 (Del. 1984). "The second definitional element of a public body is that the entity be supported by public funds, expend or disburse such public funds, or be specifically charged by any other public body to advise or make recommendations." *Id.*



In *Att'y Gen. Op.* 94-IO11 (Mar. 7, 1994), our Office determined that the public record requirements of FOIA do not apply to the judiciary or the Administrative Office of the Courts because it is an arm of the judiciary.<sup>1</sup> Relying on *Delaware Solid Waste Authority, supra*, our Office concluded that the "judicial role of resolving disputes through the application of judicial precedent" was not an executive or legislative function; therefore the courts were not a "public body" as defined by FOIA.

"[C]onspicuously absent from the definition of a 'public body'" in FOIA "are the words 'court' or 'judicial branch.'" *Att'y Gen. Op.* 05-IO01 (Jan. 18, 1995). A canon of statutory construction is "*expressio unius est exclusio alterius* – the expression of one thing is the exclusion of another." *Priest v. State*, 879 A.2d 575, 584 (Del. 2005). By omitting any reference to the judiciary in the definition of a "public body," we believe that the General Assembly intended to exclude the courts from the application of FOIA.

Like Delaware's FOIA, the Illinois public records law defines a public body as "any legislative, executive, administrative, or advisory bodies of the State . . . which are supported in whole or in part by tax revenue, or which expend tax revenue." 5 Ill.Code §140/2(a). In *Copley Press, Inc. v. Administrative Office of the Courts*, 648 N.E.2d 324 (Ill. App.), *appeal denied*, 657 N.E.2d 617 (1995), the Appellate Court of Illinois held that FOIA did not apply to the Administrative Office of the Courts. "It is a maxim of statutory construction that when a statute

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<sup>1</sup> See also *Att'y Gen. Op.* 95-IO01 (Jan. 18, 1995) (Board of Bar Examiners was not a "public body" under FOIA because it "was established by the Delaware Supreme Court as 'an arm' under its 'inherent power to regulate the practice of law'" (quoting *In re Reardon*, 378 A.2d 614, 615 n.1 (Del. 1977))).



enumerates certain items, that enumeration excludes all other items although there are not negative words of prohibition." 648 N.E.2d at 327. "Here, the legislature specifically listed the legislative and executive branches of government without listing the judicial branch. The lack of any reference to the courts or judiciary must be taken as an intent to exclude the judiciary from the disclosure requirements of the Act." *Id.* at 327-28.

Delaware's FOIA mentions the courts only twice. Section 10002(g)(9) excludes from the definition of "public record" any "records pertaining to pending or potential litigation **which are not records of any court**" (emphasis added). Section 10004(h) provides that the open meeting requirements of FOIA "shall not apply to the proceedings of: (1) Grand juries; (2) Petit juries; (3) Special juries; (4) **The deliberations of any court**" (emphasis added).

These two references to the courts underscore the General Assembly's intent to exclude the judiciary from the definition of a "public body" under FOIA. A review of the tapes of the legislative history of FOIA (as originally enacted in 1976) supports this conclusion. According to the tapes, the addition of the phrase – "which are not records of any court" – to FOIA's pending litigation exemption was "requested by the press to make sure that court records were not closed which are now open." According to the tapes, Section 10004(h) of FOIA (excluding juries and court deliberations) was intended to make sure that FOIA "shall not be deemed to close any court proceedings which would otherwise be public by court rule."

The legislative history of FOIA therefore evidences the General Assembly's intent not to intrude on the judiciary's authority to issue its own rules regarding access to its records and proceedings. The "courts have inherent authority over their own records" and "the legislature has



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assured that courts will continue to control their own records. . . . premised on legislative respect for the independence of the judiciary as a co-equal branch of government." *Harvey v. Hynes*, 665 N.Y.S.2d 1000, 1005 (Sup. 1997).

### **CONCLUSION**

For the foregoing reasons, it is the opinion of our Office that the General Assembly – by the way that it defined a "public body" in Section 10002(c) – intended to exclude the judiciary from the application of FOIA. Other sections of FOIA (Sections 10002(g)(9) and 10004(h)) further evidence the legislative intent to respect the independence of the judiciary as a separate, co-equal branch of government and the judiciary's right to control access to its records and proceedings by court rule. "There is no indication that the legislative intent behind FOIA was to affect or alter the records administration of the judiciary." *Att'y Gen. Op.* IO11.

Very truly yours,

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Deputy Attorney General

APPROVED

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Lawrence W. Lewis, Esquire  
State Solicitor



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cc: The Honorable Joseph R. Biden, III  
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